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No. 08-1195

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

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PATRICK H. OTTERSON,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

◆◆◆◆◆
**On Petition For A Writ Of Certiorari
To The Superior Court Of Pennsylvania**

◆◆◆◆◆ **PETITION FOR REHEARING**

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STATEMENT OF REASONS TO GRANT REHEARING

THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT REHEARING TO REVIEW PETITIONER'S CLAIM THAT THE SUPERIOR COURT OF PENNSYLVANIA ERRED BY NOT FOLLOWING THE INSTRUCTION OF THE SUPREME COURT OF PENNSYLVANIA ON REMAND AND AGAIN AFFIRMED THE COURT OF COMMON PLEAS' DECISION REFUSING TO GRANT PETITIONER'S MOTION TO SUPPRESS EVIDENCE BASED UPON A RESIDENTIAL SEARCH WARRANT THAT LACKED PROBABLE CAUSE UNDER THE REQUIREMENTS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS SET FORTH BY THE UNITED STATES SUPREME COURT IN *ILLINOIS V. GATES*, 462 U.S. 213 (1983).

Petitioner has contended that the search warrant issued for Warren Street was not supported by sufficient probable cause as it was based upon anonymous sources with no record of previous reliability, whose accusations were not corroborated by police investigation except as to non-criminal general facts. The unidentified informants in the Affidavit did not even establish how they would have acquired their knowledge of these observations. Therefore the seizures should have been suppressed as well as the subsequent warrant issued for Sterigere Street, which was fruit of the poisonous tree.

The Superior Court of Pennsylvania decided this matter in a manner which conflicts with the standards set forth in the Fourth Amendment to the United States Constitution. The anonymous tips in the Warren Street Affidavit do not meet the basis of knowledge, veracity, or reliability requirements established under *Illinois v. Gates*.

In the first round of appellate review the Superior Court provided no analysis at all of Petitioner's claim that the search warrant for Warren Street was constitutionally deficient in that it lacked probable cause to support its issuance under *Illinois v. Gates*. In the 2 to 1 decision, the Superior Court merely adopted the reasoning of the Suppression Court that the anonymous tips corroborated each other.

Judge Popovich, Senior Judge of the Superior Court, wrote a dissenting opinion where he found the anonymous tips presented information that was substantially similar and could have been obtained easily by the police and were not sufficient to form the basis for a warrant. He rejected the Commonwealth's argument that the tips from the anonymous sources could have provided self-corroboration. Judge Popovich reasoned that the four corners of the Affidavit for Warren Street failed to sufficiently demonstrate that the anonymous sources had a basis of knowledge regarding the Petitioner's alleged criminal activity inside that location and also failed to establish their reliability. He found that the only facts corroborated by the police via their investigation were as follows: (1) Petitioner was not present at the Warren Street

property during their investigation, despite his status as lessee of the property; (2) the air conditioners and lights were on continuously, despite Petitioner's absence; (3) the windows were covered; and (4) the Warren Street property was locked. He concluded that those facts were non-criminal in nature and do not establish a probability that Petitioner was engaged in a marijuana growing operation. Petitioner is confident that if this petition for rehearing is granted the Supreme Court of the United States will conclude, just as Judge Popovich did, that the search at Warren Street was unlawful and the subsequent search at Sterigere Street was tainted by that primary illegality leading this Honorable Court to reverse the Superior Court and suppress all evidence obtained from the searches.

The Supreme Court of Pennsylvania vacated the decision of the Superior Court and remanded the matter back to the Superior Court for consideration in light of *Commonwealth v. Torres*, 764 A.2d 532 (Pa. 2001). In *Torres* the affidavit failed to make a showing of the reliability of the information the anonymous sources relayed to the police to support a finding of probable cause under *Illinois v. Gates*. The Court noted that limited corroboration of general information provided by the informants was not enough to sustain the warrants.

The Superior Court's new opinion authored by Judge Lally-Green no longer relied on the Suppression Court's decision that the anonymous tips corroborated each other. Judge Lally-Green now reasoned that the instant case differs from *Torres* in that the Affidavit

for Warren Street specifically provided information regarding the basis of the anonymous sources' knowledge and that the veracity of the sources' information was corroborated by independent police investigation.

Petitioner respectfully disagrees and submits that a fair and objective review of the Affidavit in support of this search warrant establishes that probable cause was not presented within the four corners of the Affidavit. The ruling of the Superior Court cannot stand under *Illinois v. Gates* and *Commonwealth v. Torres*. As was the case in *Torres*, here too, the police have relied upon unnamed, unidentified, and anonymous or confidential sources who satisfy neither the basis of knowledge nor reliability requirements under *Gates* and *Torres*. There was no information presented that qualified the sources veracity, reliability, or their competence to know what marijuana looks and smells like. The tips provided no predictive conduct or information that would provide police with means to test the informants knowledge or credibility as the tip in *Gates* provided. The informants do not give a detailed description of the alleged marijuana growing. There were no accounts of marijuana use or sales. The sources did not even know the occupant's name or any other address associated with him. The police did not corroborate any allegations of criminal activity. All the police had to rely on were bare reports from unknown, unaccountable informants who neither explained how or when they made their observations nor supplied any basis for believing they had inside information.

The only information that the police investigation revealed was that the occupant was not at the property during their many periodic checks, the air conditioners and lights were on continuously, the windows were covered by the complete closing of blinds and curtains and the doors were locked. Notwithstanding the locked doors, this information could be observed from the "public" sidewalk or street. These general observations were publicly available and non-criminal in nature.

The police investigation failed to corroborate that the occupant was a white male or that he owned or operated a silver pick-up truck, even with their access to governmental records, which was information presented to the police. The police did not associate the occupant with any other address except the one on Warren Street. The police did not corroborate that somebody comes to pick up the mail, which is delivered every day excluding Sunday, or that the occupant removes trash bags at night. The police did not see anyone coming from or going to the property, yet there was supposedly a marijuana growing operation going on at the property. The police do not corroborate that the air conditioning units and lights are operating on a timer, only that they are continuously on. It is not corroborated by the police that the odor of marijuana existed or that marijuana could be seen growing on the first floor. In fact, it was not confirmed that marijuana was growing or that it was ever growing on the first floor after the warrant was executed. The police failed to establish, through a thermal search, the existence of high powered

hydroponic lamps or that there was an excessive amount of electricity being drawn at the property.

In the "Conclusion" on page 9 of the Affidavit the affiant, Officer Parsley, states, "as an experienced Narcotics Detective, Detective Altieri is aware that if a person was to cultivate marijuana in a residence, they would need hydroponic lights, which would draw excessive electricity for them to operate. These high-powered lamps would create an excessive heat source to radiate inside the residence." However, there is no information whatsoever in the Affidavit to support these statements.

Our Founding Fathers were pioneers in establishing a country that protected human liberty, our United States. They used their experience as leaders to solve as well as prevent the problems that existed and plagued governments throughout history. When writing the United States Constitution, the foundation of our United States Government, they did so with much foresight in creating a government that would not be so powerful as to remove the power from the people to ensure a successful country for future generations.

The Fourth Amendment to the United States Constitution was written by design and the purpose was to deter government intrusion and police misconduct by keeping its citizens safe in their persons, houses, papers, and effects from unreasonable searches and seizures without just probable cause.

The United States Constitution borrowed from many of the original 13 colonies that had already adopted their own constitutions. Pennsylvania's Constitution was adopted on September 28, 1776, a full ten years prior to the ratification of the United States Constitution. The requirement of probable cause traces its origin to Pennsylvania's original Constitution of 1776. The primary purpose of the warrant requirement was to abolish "general warrants," which had been used by the British to conduct sweeping searches of residences and businesses based upon generalized suspicions. The issue of searches and seizures unsupported by probable cause was of utmost concern to the constitutional draftsmen.

The Supreme Court cannot allow our police to conduct searches and seizures on the grounds of accusations without any police corroboration where the basis of knowledge and veracity of anonymous sources is not established and there is no showing of the reliability of the information that the sources relayed to the police.

**REHEARING SHOULD BE GRANTED
TO RESOLVE THIS FUNDAMENTAL
CONSTITUTIONAL ISSUE OF
GREAT PUBLIC IMPORTANCE**

After the Superior Court once again affirmed the Court of Common Pleas' decision refusing to grant Petitioner's Motion to Suppress Evidence, Petitioner

filed for another Allowance of Appeal with the Supreme Court of Pennsylvania but that Court declined review. Petitioner respectfully notes for this Court that under *Stone v. Powell*, 428 U.S. 465 (1976), a claim that Petitioner's rights under the Fourth Amendment have been violated will not be entertained on federal habeas corpus review. Therefore, the United States Supreme Court is the only opportunity to have a court consider the merits of his suppression claim. Petitioner filed a Petition for a Writ of Certiorari with the United States Supreme Court which was denied on May 18, 2009. This Petition For Rehearing is the final opportunity to resolve this important Constitutional issue and it should be settled by this Honorable Court.

CONCLUSION

For all the reasons expressed herein, as well as in view of the argument set forth in Petitioner's Petition for a Writ of Certiorari filed with this Court on March 26, 2009. Petitioner respectfully requests that this Honorable Court exercise its sound judicial discretion and grant this Petition for Rehearing and allow further review of the ruling of the Superior Court of Pennsylvania because there are special and important reasons that justify the grant of relief to Petitioner, particularly that the Superior Court has decided this issue in a manner that conflicts with the requirements of probable cause under the Fourth

Amendment to the United States Constitution as set forth by the United States Supreme Court in *Illinois v. Gates*.

Respectfully submitted,
PATRICK H. OTTERSON

CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

PATRICK H. OTTERSON